Supreme Court, U.S.
FILED
AUG 28 2001
OFFICE OF THE CLERK

No. 01-172

IN THE

Supreme Court of the United States

BIOMET, INC.,

Petitioner,

v.

DR. RAYMOND G. TRONZO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PATRICK LYSAUGHT*
BEVERLY GARNER
PAUL D. SNYDER
POLSINELLI SHALTON & WELTE
700 W. 47th Street, Suite 1000
Kansas City, MO 64112
(816) 753-1000

Counsel for Defense Research Institute as Amicus Curiae

* *Counsel of Record*

169053

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the Amicus Curiae	1
Summary of the Argument	1
Argument	3
A. The Practical Impact Of The Ruling Below Will Be Far-Reaching And Result In A Substantial Loss Of Judicial Economy, Efficiency, Consistency And Fairness.	3
B. The Punitive Damages Award, Which Is *Per Se* Unconstitutional, If Left Standing, Likely Will Encourage Other Unreasonably Excessive Awards.	9
B. The Punitive Damages Award, If Left Standing, May Encourage Other Unreasonably Excessive Awards.	9
Conclusion	18

Cited Authorities

Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 7

Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 7

Bielicki v. Terminix Int'l Co., L.P., 225 F.3d 1159 (10th Cir. 2000) 11

BMW v. Gore, 517 U.S. 559 (1996) ..... *passim*

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 16

Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n, 775 F.2d 366 (D.C. Cir. 1985) 6

Clinton v. Jones, 520 U.S. 681 (1997) 7

Cooper v. Indus., Inc. v. Leatherman Tool Group, 121 S. Ct. 1678 (2001) 9, 14, 15, 16, 17

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 16

Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000) 11, 12

Cited Authorities

	Page
Gregg v. U.S. Industries, Inc., 721 F.3d 345 (11th Cir. 1983)	8
Jeffries v. Wal-Mart Stores, Inc., 2001 U.S. App. LEXIS 16753 (6th Cir. July 20, 2001)	12
Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999)	12
Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997)	12
O'Dell v. Hercules, Inc., 904 F.2d 1194 (8th Cir. 1990)	6
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	11, 17
Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)	7
Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000)	12
Rubinstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1393 (2001)	12
Shea v. Galaxie Lumber, 152 F.3d 729 (7th Cir. 1998)	12

Cited Authorities

	Page
Sprague v. Ticonic National Bank, 307 U.S. 161 (1939)	8
Thomas v. Anchorage Equal Rights Comm'n., 220 F.3d 1134 (9th Cir. 2000)	7
TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)	9, 10, 11, 14
Watkins v. Lundell, 169 F.3d 540 (8th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999)	12
Statutes:	
21 U.S.C. § 331	16
21 U.S.C. § 333(a)(2)	16
Ala. Code § 8-19-11	16
Fla. Stat. § 501.2075	16
Fla. Stat. § 688.004	16
R.S. Mo. § 407.020	16
R.S. Mo. § 407.025	16

Cited Authorities

Page

Other Authority:

Paul R. Michel, *A Review Of Recent Decisions Of The United States Court Of Appeals For The Federal Circuit: Introduction: The Challenge Ahead: Increasing Predictability In Federal Circuit Jurisprudence For The New Century*, 43 AM. U.L. REV. 1231 (1994) 7

INTEREST OF THE AMICUS CURIAE

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyers and 400 corporate members throughout the United States. It seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar and potential defendants are properly and adequately represented.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, through testimony before Congress and state legislatures on select legislation impacting the civil justice system, and by participation as amicus curiae on issues of significance to the defense bar and its clients. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.[1]

Both parties provided written consents to the filing of this brief.

SUMMARY OF THE ARGUMENT

If the Federal Circuit's interpretation of the appellate mandate rule in *Tronzo II* is allowed to stand, the manner in which appeals must be pursued in that circuit and perhaps elsewhere will be substantially and unfairly altered. Numerous litigants will be forced to assert hypothetical and contingent issues in their appellate briefs, and appellate courts will be left to sort out the real issues. To not raise such contingent issues

---

1. Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this brief. No one other than DRI made a monetary contribution to the preparation or submission of this brief.

will risk foreclosure. Not only does *Tronzo II* stand in stark contrast with the precedent of this Court and other courts of appeal, it runs counter to sound judicial policy. The Federal Circuit's ruling deals a serious blow to judicial economy, fairness and efficiency, in addition to creating traps for unfortunate appellate counsel who act at their own peril and that of their clients if they do not anticipate hypothetical issues correctly. This Court must act now to avoid such chaos.

In addition, *Tronzo II* stands for the proposition that, under certain circumstances, a punitive damages award that is 38,000 times greater than actual damages can survive an appellate challenge. Such a message runs counter to the Court's express mandate in *BMW v. Gore*, 517 U.S. 559 (1996) and its progeny. Upon any type of application of the *BMW* factors, there can be no question that a $20 million punitive damages award based on $520 in actual damages is "grossly excessive." Following the reduction of compensatory damages to a *de minimus* amount, Biomet did not have adequate notice of the magnitude of the sanction that might be imposed for its purportedly wrongful behavior. Allowing such an irrationally excessive ratio to stand may well be a ground as support for other unreasonable punitive damages ratios, both in the Federal Circuit as well as in other courts of appeals. Most significantly, a decision allowing a 38,000 to 1 ratio to stand could very well render meaningless this Court's important decisions in *BMW* and its progeny. For this additional reason, DRI requests the Court grant the petition.

ARGUMENT

A. The Practical Impact Of The Ruling Below Will Be Far-Reaching And Result In A Substantial Loss Of Judicial Economy, Efficiency, Consistency And Fairness.

The ill-conceived interpretation of the appellate mandate rule endorsed by the Federal Circuit in *Tronzo II* has broad and troubling implications for the numerous litigants and their counsel who appeal cases within that circuit, as well as litigants that appeal patent cases across the country.[2] For such litigants, many of whom are members of DRI, the ruling below fundamentally, unfairly and incomprehensibly alters the way in which appeals must be pursued. The rule requiring the assertion of hypothetical and contingent claims in appellate briefs is a "Catch 22" for all litigants; it is also antithetical to the consistency and clarity that are hallmarks of sound legal policy.

What transpired upon remand following the Federal Circuit's decision in *Tronzo I* is exactly what most parties and counsel would expect. The district court, implementing the mandate of the Federal Circuit, first determined the appropriate amount of compensatory damages and reduced that award to $520. Following additional briefing, the district court correctly concluded that under *BMW v. Gore*, 517 U.S. 559 (1996) and its progeny a $20 million punitive damages award could not be constitutionally supported by an award of $520 in compensatory damages. The district court, therefore, reduced punitive damages to $52,000, which bore a still high, but more reasonable ratio (100 to 1) of punitive to compensatory damages. Rather than accepting the district court's *BMW* analysis and the punitive damages reduction

2. The Federal Circuit has exclusive national jurisdiction in patent cases.

required thereby, Dr. Tronzo appealed. Apparently, Dr. Tronzo seized the opportunity, believing he could argue that Biomet in *Tronzo I* had waived its right to contest the constitutionality of the punitive damages award. However, for the reasons established hereafter, such a proposition is meritless.

As ably demonstrated in Biomet's petition, there can be no question Biomet's argument regarding the "grossly excessive" and unconstitutional nature of the punitive damages award under *BMW* did not come into existence until after the district court reduced compensatory damages to $520. Neither can there be any doubt that the Federal Circuit would not and more importantly could not have entertained an excessiveness challenge if it had been made at the time of the *Tronzo I* appeal.

Yet, Biomet was precluded from asserting a *BMW* defense following the virtual elimination of all compensatory damages, even though this Court has unambiguously stated that substantive justice requires a "person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Neither Biomet, nor similarly situated persons or entities, had any notice under Florida law, much less fair notice, that a minor state law violation would justify a $20 million punishment more than 38,000 times the amount of the actual harm caused.

In light of this troubling rule, instead of appealing only those issues that are ripe for consideration, appellants must now peer into their crystal balls and attempt to predict what additional issues may subsequently arise after remand. Defense practitioners will have no choice but to advise clients to assert hypothetical and speculative issues on appeal. To not raise such issues will, as here, risk absolute foreclosure.

Appellants and appellees both will be forced to pare back arguments on legitimate issues to make room in briefs for arguments on contingent and hypothetical issues. Such a result will be particularly problematic in the complex appeals that DRI members frequently handle. As in *Tronzo I*, such cases often involve numerous legitimate and ripe appellate issues involving multiple causes of action and multiple challenges to liability and damages. Moreover, what will be the result if appellants guess wrong? Will appellants be deemed to have waived an issue by failing to anticipate the basis of an appellate decision in their hypothetical arguments? If the rule in *Tronzo II* prevails, that is exactly what will happen.

In the medical field, doctors often order multiple overlapping tests and unnecessary treatments not because good medicine requires it, but to protect the doctor in the event of a remote contingency. So too lawyers handling appeals will now necessarily focus not on what is at issue, but what might be at issue, depending on what an appellate court might hypothetically do. The confusion wrought by *Tronzo II* will be enormous in any complex case but will be most acute in complex cases that also involve the critical issue of the constitutionality of punitive damages awards. In those cases, appellants such as Biomet must predict how courts of appeal will decide issues of liability and compensatory damages, and how district courts will handle such issues on remand, if the cases are remanded. Appellate briefs will consist of a series of hypothetical arguments about whether punitive damages awards are grossly excessive under an infinite number of scenarios. Courts will be unnecessarily faced with a plethora of arguments that are strictly contingent on the success of other arguments. Logic and sound judicial

policy dictate that core issues central to the appeal, not every contingent issue which could possibly be raised, be the focus of the parties' briefs and the appellate courts' attention.

Sound judicial policy should be based on judicial economy, fairness, predictability and clarity. *See, e.g., Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 775 F.2d 366, 372 (D.C. Cir. 1985) (discussing the judicial goals of "clarity, consistency, judicial economy, efficiency and the avoidance of needless expense"); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1202 (8th Cir. 1990) (in ruling on matters, "courts should consider the preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and possibilities for confusion"). The rule announced by the Federal Circuit provides for none of these elements. First, the rule is unfair not only to Biomet but to all litigants that now must speculate as to what an appellate court might do and therefore be forced to analyze and brief all issues based upon all possible outcomes. In light of the real fear of waiver, it is highly likely speculative issues will be numerous. Further, *Tronzo II* promotes neither consistency nor clarity and in fact is the antithesis of these two goals, because it promotes speculative briefing on contingent and hypothetical matters not directly at issue. Another undesirable outcome of *Tronzo II*, therefore, is the promotion of gross inefficiency in the appellate process.

The rule espoused in *Tronzo II* also spawns unpredictability. Appellants will never be certain they have accurately anticipated and properly briefed all potential issues. As Judge Paul Michel of the Federal Circuit stated, predictability is essential so the "actual outcome of potential litigation may be accurately forecast through the consistent application of clearly stated legal principles to new factual

situations." Paul R. Michel, *A Review Of Recent Decisions Of The United States Court Of Appeals For The Federal Circuit: Introduction: The Challenge Ahead: Increasing Predictability In Federal Circuit Jurisprudence For The New Century*, 43 AM. U.L. REV. 1231, 1233 (1994). Moreover, in light of the Federal Circuit's national jurisdiction, predictability in that Circuit is "unusually important." *Id.* If the law is to encourage appropriate conduct, then at a minimum, it must clearly tell those involved what to expect. The lack of predictability can cause, as here, gross injustice.

All of these problems can be avoided if long established and well-reasoned precedent is followed. *Tronzo II* stands in stark contrast with the traditional notion that courts should not decide issues that are purely hypothetical and speculative. As the Ninth Circuit recently noted, appellate issues must be "definite and concrete, not hypothetical or abstract." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). Ripeness is "designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* at 1138 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). The role of an appellate court "is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Id.*[3]

---

3. *See also Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945)) (courts should decline "'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision

(Cont'd)

As demonstrated here and in Biomet's petition, the *BMW* punitive damages defense based upon an unconstitutional lack of due process was not "definite and concrete" at the time of *Tronzo I*. Rather, the issue was contingent on a "final disposition" of proceedings on remand. Such contingent issues, as this Court held long ago, are not subject to the mandate rule. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939).[4]

Simply put, and despite baseless protests to the contrary, the mandate rule is not implicated here at all. The mandate in *Tronzo I* did not directly or indirectly preclude the district court from reducing the punitive damages award when, as directed by the Federal Circuit's mandate, that court reduced the compensatory damages award. To argue otherwise is pure sophistry. The *ipse dixit* interpretation of the mandate in *Tronzo I* by the Federal Circuit notwithstanding, reasonable minds could not conclude that the district court was precluded from reducing the punitive damage award under a BMW analysis. Perhaps in reaching its decision the Federal Circuit believed the sanctity of its mandate was at issue. Importantly, it was not, nor could it be. The *Tronzo I* mandate was not at issue in *Tronzo II*, nor is it here.

(Cont'd)
. . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .'")

4. *See also Gregg v. U.S. Industries, Inc.*, 721 F.3d 345 (11th Cir. 1983) (per curiam) (court noted that, although the punitive damages issue had not been briefed or argued, the district court should decide the issue of whether a punitive damages award remained in effect with the compensatory award being reversed).

Although surely unintended, the fallout from the Federal Circuit's ruling in *Tronzo II* will wreck havoc with consistency, fairness, judicial economy and efficiency, in addition to creating traps for parties and their unfortunate appellate counsel. DRI urges the Court to act now to prevent such chaos and grant the petition.

B. The Punitive Damages Award, Which Is *Per Se* Unconstitutional, If Left Standing, Likely Will Encourage Other Unreasonably Excessive Awards.

As demonstrated here and in Biomet's petition, the Federal Circuit erroneously concluded in *Tronzo II* that the mandate rule prevented it from even considering Biomet's proper constitutional challenge to the $20 million punitive damages award when the evidence actually proffered by Dr. Tronzo established only $520 in actual damages. Had the Federal Circuit conducted a *de novo* review of the punitive damages award, as required by this Court's decision in *Cooper v. Indus., Inc. v. Leatherman Tool Group,* 121 S. Ct. 1678 (2001), it would have determined that under Florida law, Biomet did not receive adequate notice of the magnitude of the sanction that might be imposed for its purportedly fraudulent behavior. *See Cooper*, slip op. at 8. As a result, the Federal Circuit impermissibly and unconstitutionally allowed the imposition of a "grossly excessive" punishment in violation of Biomet's right to due process. *BMW*, 517 U.S. at 562; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-455 (1993) (plurality opinion). If the petition is not granted, the damages award and its corresponding ratio of 38,000 to 1 will stand. This unfortunate result would make it more likely other unreasonably excessive awards and ratios, in the Federal Circuit and elsewhere, could withstand constitutional challenges, thereby impacting many DRI members and other appellants. For this additional reason, the Court should grant the petition.

In determining whether a punishment is grossly disproportionate to the gravity of a tortfeasor's behavior, this Court has identified three separate but interrelated guideposts that must be considered: (a) the degree of reprehensibility of the tortfeasor's conduct; (b) the disparity between the harm or potential harm suffered by the injured party and the punitive damages awarded; and (c) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *BMW*, 517 U.S. at 574-75. Without question, this Court intended for these guideposts to protect a tortfeasor's constitutional right to receive fair notice not only of the conduct that would subject the tortfeasor to punishment, but also of the severity of the penalty that could be imposed. *Id.* at 575. By refusing to squarely address Biomet's constitutional challenge to the grossly excessive punitive damages award, the Federal Circuit circumvented the express charge of this Court to do so in exactly such circumstances.

The most relevant guidepost here, the ratio of a punitive damages award to the harm inflicted, arises from the well-recognized principle embraced by this Court that exemplary damages must bear a "reasonable relationship" to compensatory damages. *BMW*, 517 U.S. at 580. In so holding, this Court has stressed that the "reasonable relationship," or the line beyond which the award becomes unconstitutional, is not marked by a simple mathematical formula that compares actual and potential damages to the punitive award. *BMW*, at 582. *See also TXO*, 509 U.S. at 458.

The Court granted certiorari in *BMW* to assess whether a punitive damages award of $2 million exceeded constitutional limits in light of a compensatory damages

award of only $4,000, a ratio of 500 to 1.[5] The Court generally observed in discussing punitive damages awards that, "[i]n most cases, the ratio will be within a constitutionally acceptable range, however, when the ratio is a breathtaking 500 to 1, the award must surely 'raise a suspicious judicial eyebrow'." *BMW*, at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting). The Court had also concluded in a prior case that a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991). Similarly, this Court upheld a ratio of not more than 10 to 1 when the punitive award was compared to the harm that might have been caused if the tortious plan had succeeded. *TXO*, 509 U.S. at 460.

Courts of appeal applying the *BMW* factors have held that punitive damages awards in the range of 12 to 50 times actual damages to be constitutional.[6] But appellate courts

5. In *BMW*, the purchaser of a new *BMW* automobile sued Alabama's *BMW* distributor alleging fraud and other theories after he discovered the car had been repainted prior to its initial sale to him. The jury returned a verdict finding the distributor liable for compensatory damages in the amount of $4,000 and assessed $4 million in punitive damages. Both the trial court and the state supreme court rejected *BMW's* argument that the punitive award was grossly excessive. However, the Alabama Supreme Court reduced the punitive damages award to $2 million because the jury improperly multiplied the amount of compensatory damages established by the number of similar incidents in the entire United States rather than those only in Alabama.

6. *See Bielicki v. Terminix Int'l Co., L.P.*, 225 F.3d 1159 (10th Cir. 2000) (upholding a ratio of 12 to 1 where plaintiffs suffered permanent, chronic injuries from defendant's employee's spraying of toxic pesticides in their presence); *Grabinski v. Blue Springs Ford*

(Cont'd)

have also concluded that ratios of 14.89 to 1, 30 to 1, 100 to 1, and 320 to 1 were unconstitutionally excessive.[7]

(Cont'd)
Sales, Inc., 203 F.3d 1024 (8th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000) (affirming approximate ratio of 27 to 1 on numerous violations of the Missouri Merchandising Practices Act); *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000) (finding ratio of 19 to 1 to be constitutionally acceptable in a Title VII action); *Jeffries v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 16753 (6th Cir. July 20, 2001) (upholding punitive damages of $425,000 for conduct that garnered only an $8,500 compensatory damages award, a 50 to 1 ratio); *But see Shea v. Galaxie Lumber*, 152 F. 3d 729 (7th Cir. 1998) (refusing to remit punitive damages of $2,500 when only $1 in compensatory damages had been awarded on plaintiff's Title VII claim).

7. *Watkins v. Lundell*, 169 F.3d 540 (8th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999) (reducing punitive damages from $3.5 million to $940,000 when actual damages awarded were $235,000 on breach of contract and fraud claims because conduct that justified a 4 to 1 ratio was not reprehensible enough to support a 14.89 to 1 ratio); *Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1393 (2001) (reducing punitive damages of $75,000 to $25,000 when actual damages for a single act of retaliation under Title VII awarded were $2,500 because the facts, analyzed under *BMW*, did not justify a ratio of 30 to 1, but could support a ratio of 10 to 1); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (finding an award of $5 million in punitive damages, previously reduced from $50 million, excessive and reducing punitive award to $350,000 on plaintiff's hostile work environment and constructive discharge claims); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (reducing a punitive damages award of $15 million to $4.35 million when the aggregate actual damages were $47,000 because a ratio of 320 to 1 was excessive and the 100 to 1 ratio was the maximum permitted by the constitution). Apparently, the district court in *Tronzo II* agreed with the rationale of the court in *Johansen*, having reduced the punitive damages award to $52,000, thereby creating a 100 to 1 ratio.

Besides supporting the unfounded proposition that a 38,000 to 1 ratio of punitive to actual damages could ever be constitutional, *Tronzo II* encourages courts to speculate about potential damages that could have been caused by a tortfeasor's conduct, but were not proven. Although in assessing punitive damages it is proper to assess the amount of potential harm that could have been caused if the tortious plan had been fully carried out, an appellate court does not have license to speculate regarding damages evidence that was not produced at trial.

For example, if a manufacturer knowingly distributes a contaminated product that ultimately injures only a few people because most of the product is seized by the government, the court can consider the fact that many more injuries would have been sustained if the product had been fully distributed. In stark contrast, the Federal Circuit below simply speculated there must have been more than $520 in actual damages. The Federal Circuit apparently believed the record contained a "strong suggestion" that the potential compensatory damages may have been much higher than what was actually awarded. *Tronzo II*, 236 F.3d at 1350. Presumably, the Federal Circuit based its speculation on the district court's decision not to reopen the record to receive additional evidence of actual damages because "both parties had been represented by competent counsel and had made strategic decisions in this protracted litigation." *Id.* at 1345. Contrary to the Federal Circuit's interpretation of this unambiguous statement, the district court refused to reopen the record because it concluded that if additional evidence of actual damages had existed, the parties' competent counsel would surely have introduced it. In any event, the district court had already taken into account that the proffered evidence of compensatory damages might not adequately

reflect the actual harm sustained when it established a punitive damages ratio of 100 to 1, despite Florida's preference for a 3 to 1 ratio.

Not surprisingly, the Federal Circuit recognized that a ratio of 38,000 to 1 is one that would certainly "raise a suspicious judicial eyebrow." *Id.* at 1350. The Federal Circuit, however, insisted that constitutionality was not simply a matter of ratios but required an analysis of all three *BMW* guideposts. Ironically, the Federal Circuit then failed to perform the analysis it espoused. *Id.* At some point, particularly where no harm is visited on the life, limb or physical well being of any person, i.e., where the only harm is economic damage involving a property right, a large award of punitive damages becomes *per se* unconstitutional. That clearly is the case here.

If this punitive damages award is allowed to stand, defendants in the Federal Circuit and across the country will be faced with the virtually impossible task of distinguishing the award here each time a plaintiff cites *Tronzo II* in support of an egregiously excessive punitive award. Undeniably, if it is concluded the facts and conduct in *Tronzo* support a punitive damages award more than 38,000 times higher than the actual damages award, this Court's decisions in *BMW*, *TXO* and *Cooper* are rendered meaningless.

Another of the interrelated *BMW* guideposts is the "degree of reprehensibility of the tortfeasor's conduct." *BMW*, 517 U.S. at 575. *See also TXO*, 509 U.S. at 453, 462. As in *BMW*, none of the aggravating factors associated with significantly reprehensible conduct is present here. The harm sustained by Dr. Tronzo as the result of Biomet's conduct was purely economic in nature, amounting to only $520. *Tronzo II*, 236 F.3d at 1347. Evidence submitted by

Dr. Tronzo failed to prove that Biomet's actions threatened the health and welfare of any patients or other persons. To the contrary, the evidence established that patients benefited from Biomet's development and marketing of the acetabular cup. In fact, the sole evidence in the record identified by the Federal Circuit in *Tronzo II* concerning this guidepost was the district court's indication that Biomet "misappropriated Dr. Tronzo's ideas and . . . misled Dr. Tronzo and substantially profited thereby." *Id.* at 1350. Critically, there was no evidence that Biomet had otherwise engaged in or would repeat this behavior. The evidence in the record cannot be characterized as "trickery and deceit" or intentional malice sufficiently reprehensible to justify a $20 million award of punitive damages. *See BMW*, 517 U.S. at 576.

The Federal Circuit also ignored the indisputable truth that the district court possessed direct and superior knowledge of the exact nature of Biomet's purportedly reckless conduct. *See Cooper*, slip op. at 14-15. Specifically, the district court had the best vantage for evaluating issues such as witness credibility and demeanor. *Id.* The Federal Circuit also improperly ignored the jury's own measure of the moral reprehensibility of Biomet's conduct. *Id.* at 9. Neither the jury nor the district court concluded, based upon all of the evidence, that the reprehensibility of Biomet's conduct justified a punitive to actual damages ratio of 38,000 to 1. The reason is simple; it did not. It is virtually inconceivable that commercial conduct involving intellectual property rights and the profits to be generated by the development of those ideas, no matter how acquired, could ever support such a disproportional relationship between actual and punitive damages.

The third and final interrelated guidepost for determining excessiveness invites a comparison of the punitive damages award to the civil or criminal penalties that could be imposed for similar misconduct. "Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Cooper*, slip op. at 10 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The reviewing court must give "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. *BMW*, 517 U.S. at 583 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (opinion concurring in part and dissenting in part).

The Florida legislature has imposed various restrictions on punitive damages awards, including a requirement that there be a reasonable relationship between the damages awarded and the actual injury suffered. Fla. Stat. § 768.74(5). In addition, there is a statutory cap on punitive damages awards (in most cases) of three times the amount of compensatory damages. Fla. Stat. § 768.73(1). Moreover, the maximum fine authorized by the Florida Legislature for a violation of the Florida Deceptive and Unfair Trade Practices is $10,000 for each unlawful act. *See* Fla. Stat. §§ 501.2075, 688.004.

Similarly, the Food, Drug and Cosmetic Act punishes violators that intentionally defraud or mislead the FDA about medical devices with imprisonment for up to 3 years and a fine of $10,000. *See* 21 U.S.C. §§ 331, 333(a)(2). Other states authorize similar sanctions. *See, e.g.*, Ala. Code § 8-19-11 (civil penalty of not more than $2,000 per violation) (2001) R.S. Mo. §§ 407.020, 407.025 (violators are guilty of a Class D misdemeanor and civil actions are allowed to recover

actual and punitive damages and attorney's fees); 815 I.L.C.S. 505/7 (allowing civil penalties in a sum not to exceed $50,000 and, in the event the court finds an intent to defraud, an additional civil penalty in a sum not to exceed $50,000 per violation my be imposed).

Not one of these statutes provide a manufacturer in Florida or anywhere else with fair notice that a single violation could subject the manufacturer to a multimillion dollar penalty, tens of thousands of times greater than the actual harm caused. Moreover, the sanction imposed in *Tronzo II* cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies would achieve that goal. Here, there is no reason to believe that a punitive damages award bearing a closer relationship to the actual harm sustained by Dr. Tronzo would not be sufficient to prevent Biomet from engaging in the same conduct.

The Federal Circuit's misapplication of the mandate rule resulted in an unconstitutional award of punitive damages in *Tronzo II*. In so ruling, the Federal Circuit failed to adhere to the teachings of this Court, requiring that an award of punitive damages comport with constitutional due process. *Cooper*, at 12, n.9 (citing *Haslip*, 499 U.S. at 20-21). If allowed to stand, plaintiffs across the country will cite to *Tronzo II* as authority for egregiously excessive punitive awards. As noted, if this punitive damages award is left standing, likely no punitive damages award elsewhere could be found unconstitutional. It is essential, therefore, that the Court grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PATRICK LYSAUGHT*
BEVERLY GARNER
PAUL D. SNYDER
POLSINELLI SHALTON & WELTE
700 W. 47th Street, Suite 1000
Kansas City, MO 64112
(816) 753-1000

Counsel for Defense Research Institute as Amicus Curiae

* *Counsel of Record*